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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EVELIA ZORAIDA MESEBERG, Defendant and Appellant.	E044413 (Super.Ct.No. RIF128460) OPINION

APPEAL from the Superior Court of Riverside County. Michele D. Levine, Judge. Affirmed.

Maureen J. Shanahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Heather F. Crawford and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Evelia Zoraida Meseberg was found guilty of one count of assault with a deadly weapon, an automobile, (Pen. Code,[1] § 245, subd. (a)(1)) and one count of endangering a child in a manner likely to produce great bodily harm or death (§ 273a, subd. (a)). On October 19, 2007, the trial court granted formal probation for four years and ordered defendant to serve six months in county jail. However, the court suspended 60 days of that time and ordered that defendant be permitted to serve her time on consecutive weekends. Defendant appeals, contending the trial court erred in refusing to instruct the jury on accident and abused its discretion in declining to reduce her convictions to misdemeanors. Rejecting these contentions, we affirm.

I. PROCEDURAL BACKGROUND AND FACTS

According to defendant's husband of 14 years, Eric Meseberg, their relationship was volatile. They fought frequently. Although Eric was arrested once after one of their arguments, he testified that defendant was the aggressor.

On September 18, 2005, Eric went to pick up their eldest daughter, V., from visitation with defendant. He parked his car and waited for V. Defendant followed V. to the car. V. got in the car and Eric drove off.

Defendant followed Eric in her car. Eric entered the freeway and then moved into the carpool lane. Defendant followed. Suddenly, defendant sped up and bumped Eric's car with her own. She repeated this a couple of times. Eric tried to get away but heavy traffic impeded him. Defendant pulled alongside Eric's car and appeared to be

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

attempting to push his car into the center divider. Eric tried defensive maneuvers. Defendant moved back into the carpool lane behind Eric, "clipping" the rear of his car and causing it to "fishtail." Fearing that defendant would cause him to crash his car, Eric abruptly exited the carpool lane, cut across four lanes of traffic and got off the freeway.

Defendant followed. Again, she got behind Eric's car and bumped it with her car while Eric and V. were stopped at a light. The second time she bumped the car, she caused it to move forward from its stopped position. Eric thought his car was damaged. After the light changed, he pulled into a nearby parking lot to inspect the damage. As he was checking his rear bumper, defendant raced into the parking lot, driving straight at him until she hit him. Eric landed on the hood of defendant's car. Defendant backed up, and Eric fell to the ground. He got V. out of the car and she called 911.

Defendant again drove toward Eric, who put his hands up in a motion to stop her. She did not stop. Instead, she hit Eric, knocking him out of his shoes and onto the hood of her car. After she hit Eric's car, defendant backed up, and Eric's arm got hung up on the windshield wiper. While Eric was still on the hood, defendant drove out of the parking lot.

Defendant drove onto the freeway with Eric clinging to the hood and antenna, yelling for her to stop. Defendant said, "I've got you now." Suddenly, defendant stopped and pulled onto the right shoulder, causing Eric to slide off the car. Defendant sped off. Eric motioned to a driver to call the police, and Eric returned to his car. Police officers responded and took photographs of Eric and his car.

Riverside Police Officer Terry Ellefson was one of the responding officers. He interviewed Eric and V. separately. Eric was upset, bleeding from his arm, and complained of pain in his legs. Eric told the officer what had happened. However, instead of saying that defendant had rammed her car into Eric's car on the freeway, Eric told the officer that she had "com[e] within inches" of his car. He also told the officer that defendant had slowed down on the freeway shoulder and he rolled off. V. told the officer that defendant chased them, "rammed their car several times," and tried to run over Eric. She said that Eric narrowly avoided being crushed by jumping on the hood of defendant's car. V. also said that she heard defendant's tires squeal when she sped out of the parking lot. Officer Ellefson agreed the damage to defendant's car was greater than that shown in the photographs.

At trial, V.'s account of what happened differed from what she had told Officer Ellefson and from Eric's account of what happened. V. testified that defendant assisted carrying V.'s bags to Eric's car, and defendant asked why the couple's younger daughter, H., was not with Eric. V. said that Eric refused to discuss the situation in front of the house but would do so in a parking lot nearby. Accordingly, defendant got in her car and followed.

V. testified that Eric did not stop at a nearby parking lot, but drove off very fast and got onto the freeway. He suddenly cut across four lanes of traffic and exited the freeway. When defendant caught up, she did not contact the back of Eric's car at the stop light. Instead, V. stated that Eric got out of his car, banged on defendant's car window, and yelled at her. Then Eric got back into the car and pulled into the liquor store parking

lot. Defendant followed and parked alongside Eric's car. V. testified that Eric ran up to defendant's car, banged on her window, and yelled at her. Defendant tried to back up, but given the small size of the parking lot, she had to back up and pull forward several times. Eric followed her, grabbing onto her windshield wiper and holding on while he told V. to call the police.

According to V., defendant drove slowly out of the parking lot and onto the freeway. V. called 911 because "now it had gotten to a point where it could have been dangerous." Eric returned to the parking lot, and the police arrived. V. claimed the police did not give her the opportunity to give her account of what happened. She also said that she tried to interrupt the interview with Eric to correct and supplement his account, but the police would not allow her to do. She claimed that no officer ever interviewed her separately.

V. testified that Eric was physically forceful towards defendant "[a]lmost on a daily basis." He also was violent to her when she was in the eighth grade. He beat her, giving her a black eye and many bruises. When defendant found out and confronted Eric, he beat defendant.

V. denied telling the officer that defendant had chased them all the way from the house or that defendant had struck Eric's car several times. V. also denied telling the officer that defendant tried to run over Eric; that he narrowly avoided being crushed; that defendant's tires screeched as she drove off; that she (V.) called her sister and told her that defendant tried to run over Eric; or that defendant was heading to the freeway with

Eric on the hood of the car. V. said that after the incident, she moved in with defendant because Eric was getting violent.

H. testified that V. had called while the incident was taking place and said that defendant had just rammed Eric and was driving onto the freeway with Eric on the hood. H. admitted that she had never mentioned this telephone call until two years after the incident when she talked to an investigator from the district attorney's office. She also admitted that Eric was present when she received the call from the investigator. She told the investigator that Eric was covered with blood when he came home that night and that her sister was a "mama's girl." H. lived with Eric at the time of the trial and had done so prior to her parents' divorce.

According to defendant, Eric arrived to pick up V., and defendant asked, "Where's [H.]?" Eric said he would discuss the matter at the grocery store parking lot nearby, so defendant got into her car to follow. Eric did not stop at the parking lot but instead continued to the freeway driving erratically. Defendant said she did not follow Eric into the carpool lane but remained in the other lanes. When Eric veered off suddenly, defendant could not immediately follow him, but she eventually caught up. At an intersection, he jumped out of his car, ran up to her and pounded on her window, cursing at her. He did not stop until V. shouted for him to get back in the car.

Defendant followed Eric to a liquor store parking lot. Eric got out of his car, examined it, and then began punching the window of defendant's car, yelling at her. Defendant testified that a few years ago, Eric had punched through her car window and grabbed her. Thinking that he would do it again, defendant decided to leave. Because

the lot was small, defendant had to pull partially forward and back, intermittently, to maneuver towards the exit. While defendant was doing this, Eric was yelling at her, telling her not to leave. When she got near the exit, Eric jumped onto the hood of her car and grasped the windshield wiper. Defendant rolled out of the parking lot and into a lane that fed onto the freeway. Traffic prevented her from getting out of that lane so she proceeded slowly. When Eric didn't get off the vehicle, defendant rolled to a stop and waited for him to do so.

Defendant denied hitting Eric's car. Regarding her driving on the freeway with Eric on the hood of her car, she claimed she did not know that the lane she entered from the parking lot led to the freeway. Defendant also testified about Eric's prior acts of domestic violence towards her. On two occasions, she had called the police.

Detective Michael Rude of the San Bernardino County Sheriff's Department testified that he had responded to a 911 call in November 1997 involving defendant and Eric. According to his report, Eric had gotten mad at defendant, threw dishes, and pulled a telephone out of the wall. Deputy Matthew Kitchen testified that he had also responded to a call at their home in May 1996, and that his report noted that Eric had gotten mad at defendant and pushed her to the ground, bruising her.

Various witnesses who worked with defendant testified they had seen significant bruising with "no explanation" on her body. One witness had seen Eric grab defendant, push her, and shake her "violently." Defendant's brother had seen Eric grab defendant, yell at her, and "forcefully" shove defendant on more than one occasion. Defendant's

mother also had seen bruising on defendant, and experienced Eric's violence when he grabbed her and tried to "violently shove [her] with a diabolic appearance."

II. FAILURE TO INSTRUCT ON DEFENSE OF ACCIDENT

Defendant contends the trial court erred in refusing her request to give CALCRIM No. 3404, which instructs the jury that if it does not find that defendant had the requisite intent to commit the crime, but instead acted accidently, it must find her not guilty.

A. Background Facts.

During the discussion of jury instructions, the trial court noted that defendant had requested CALCRIM No. 3404, which would have told the jury that it could not find defendant guilty of any crime if she acted accidentally or without the intent required for the crime. The court commented that if the instruction applied at all, it applied only to the assault counts. It then noted that in an off-record discussion, defense counsel argued the instruction was warranted because the jury could interpret defendant's conduct of getting onto the freeway on-ramp as accidental. Counsel further argued that the jury might interpret what happened as "something between . . . [Eric] jumping on [the hood of the car] and [defendant] intentionally driving into him." Because the jury could potentially consider this action to be an accident, defense counsel argued for the instruction.

Regarding defendant accidentally driving onto the freeway, the court pointed out that defendant had testified the reason she drove into traffic with Eric on the hood of her car was that "she needed to get away as a result of . . . imminent fear." Thus, defendant's conduct was not accidental, but "purposeful conduct as it relates to self-defense." The

court pointed out that defense counsel could always argue that traffic forced defendant to enter the freeway, but it did not change the fact that her conduct was purposeful, not accidental.

Regarding defendant accidentally hitting Eric with her car, the court noted "there [was] absolutely no testimony" to that effect. Indeed, the court remarked, there was "very much [evidence] contrary to that [assertion]." Even defendant's own testimony did not support that interpretation, since she testified she never struck Eric or his car at all, but that he jumped onto hers. Accordingly, the court denied the instruction.

B. Standard of Review.

A trial court must give appropriate instructions, either upon request or sua sponte, whenever there is evidence substantial enough to merit consideration by the jury. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581 (*Manriquez*); *People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) But, "'[a] party is not entitled to an instruction on a theory for which there is no supporting evidence.' [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 715, overruled on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) On appeal, we apply a de novo standard of review. (*Manriquez, supra*, at p. 581.)

C. Analysis.

Defendant notes that Eric's testimony describes several different assaults, approximately 10 contacts between his car and defendant's, along with defendant's car personally striking him. Because of these several assaults, the trial court gave the jury the unanimity instruction (CALCRIM No. 3500). Recognizing that the evidence did not

support the defense instruction as to some of the actions, defendant nonetheless claims such is not the case as to "each of the possible contacts." Specifically, she argues that, given the inconsistent testimony between her statement that she made no contact with Eric and Eric's statement that defendant hit his car and him, "it is possible that a jury could believe that if there was any contact in these instances it was not intentional."

The People respond by arguing there was "no evidence at all, let alone substantial evidence, that [defendant] accidentally struck Eric with her car." We agree with the People. Eric testified that defendant repeatedly charged at him with her car on the freeway, the city street, and in the parking lot. He was forced onto the hood of her car in order to avoid being crushed between two cars. Eric's car was damaged, as shown in photographs and testified to by a police officer. In contrast, defendant testified that she never touched Eric or his car. She did not admit that her car came in contact with Eric or his car. Thus, there is no evidence to support an instruction on accident.

Regarding defendant accidentally getting onto the freeway, the trial court correctly noted she did so to get away from Eric. With Eric on the hood of her car, defendant intentionally left the parking lot and drove onto the street that ended up being a freeway entrance. Thus, there was no evidence of accident. Given the record before this court, we conclude the trial court correctly declined to instruct the jury on the defense of accident.

III. FAILURE TO REDUCE CONVICTIONS TO MISDEMEANORS

Pursuant to section 17, subdivision (b), defendant moved the court to reduce her convictions for assault with a deadly weapon and child endangerment likely to produce

great bodily injury or death to misdemeanors. The trial court denied the motion. On appeal, defendant contends the trial court abused its discretion in denying her request by failing to "make a full individualized consideration of all the factors which would constitute a proper exercise of discretion."

A. Background Facts.

In support of her motion to reduce her convictions to misdemeanors, defendant argued that: (1) she had no criminal record; (2) historically, Eric was the aggressor and she was the victim; (3) Eric's injuries were "relatively slight"; and (4) the attacks were brought on by a "family law situation." At the hearing on the motion, the court recognized the necessity of considering a number of factors, including, "the nature of the offense, also the offender, and also public interest with respect to the charge itself, and then, in essence, the same type of mitigating and aggravating factors that the Court looks at for purposes of sentencing." The trial court noted that defendant had no criminal history, that the incident was a family law matter, and that "[t]his is a family that has imploded, and in many respects, that has happened as a result of actions . . . ." However, the court stated, "But I don't see this as misdemeanor conduct because of the risks involved not only to yourself as well as the father of your children, but in addition to your daughter who was present in the car, and every other person and motorist that was driving near and around you and . . . the father of the children, your ex-husband, on that particular day. [¶] I believe that the serious nature— as Counsel has indicated, this did not result in serious bodily injury, but that was by, in many respects, sheer luck that it did not. The nature of using a vehicle in an assaultive way has the potential, as much as with

using a firearm or using a knife or using a deadly or dangerous weapon. I believe it was used in that fashion in this instance. [¶] I do believe that, in many respects, it was an aberration with respect to your behavior. That's clear to the Court based upon statements by family, by friends, but also based on my understanding of the factual scenario that gave rise to these events. [¶] But I don't think that that suffices, in my mind, to reduce these charges to misdemeanor conduct, and so for those reasons, the Court, having considered all of the circumstances under [Penal Code section] 17[,] [subdivision] (b), the Court will deny that motion at this point in time as to Count 1 and Count 3."

B. Standard of Review.

Assault with a deadly weapon and child abuse likely to produce great bodily injury or death are so-called "wobbler" offenses. (§§ 245, subd. (a)(1) & 273a, subd. (a); *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974-975 (*Alvarez*).) A trial court's discretion to reduce a current felony conviction to a misdemeanor for sentencing purposes is limited. "The determination to reduce a wobbler under [Penal Code] section 17[,] [subdivision] (b) 'can be properly made only when the sentencing court focuses on considerations that are pertinent to the specific defendant being sentenced . . . .' [Citations.]" (*Id.* at p. 980.) These include the defendant's criminal history as well as "'the nature and circumstances of the [current] offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' [Citations.]" (*Id*. at pp. 977-978, 980.) On appeal, we review the trial court's determinations not to reduce a wobbler to a misdemeanor for an abuse of discretion. (*Id*. at pp. 977-978.)

C. Analysis.

According to defendant, the trial court overlooked various factors "related to [defendant], the nature of the offense and the public interest with respect to the charges." Specifically, she argues that the court failed to consider the facts that: (1) because she is a 40-year-old divorced mother of two teenage daughters, it is not likely this incident will reoccur; (2) her convictions arose out of a "bitter and contentious divorce" with unresolved issues; (3) historically, Eric has been the aggressor and she has been the victim of "physical and psychological" abuse; (4) the current incident was supported only by Eric's testimony along with what he told his daughter, H.; (5) V. testified the charges against defendant were not true; (6) defendant acknowledged her acceptance of the punishment; (7) the jury convicted her of only one assault, despite the fact that the offenses were serious and, according to Eric numerous; (8) the jury had a difficult time with the case, as evidenced by its question and the fact that it deadlocked; and (9) defendant made alternative requests on this issue.

Moreover, during argument, the defense pointed out that defendant was a caregiver for the elderly and needed her driver's license to work. Counsel further noted that a felony conviction under Penal Code section 245 carries a mandatory lifetime license revocation, while a misdemeanor violation does not. (Veh. Code, § 13351.5; *People v. Linares* (2003) 105 Cal.App.4th 1196, 1198.) Thus, defendant argues the trial court's failure to consider this important factor amounted to an abuse of discretion. We disagree.

The trial court read and considered defendant's motion and the probation officer's report, which discussed defendant's lack of criminal history and her attitude toward the offenses. In addition, the court presided over the trial and was aware of defendant's demeanor. Finally, the court heard argument from counsel, as well as comments from Eric, family members and friends. The court was expressly concerned with the contentious relationship between defendant and Eric and defendant's actions involving a motor vehicle. Taken all together, the court essentially found that defendant's offenses were too serious to grant her motion. The court's comments as a whole make it clear that it did consider those sentencing objectives and factors which it deemed most pertinent under the circumstances of this case. There is no suggestion in our record that the trial court did not consider all the factors set forth in the moving papers, and defendant has not shown that the court's denial of her motion was arbitrary or irrational. We will therefore not set it aside. (*Alvarez*, *supra*, 14 Cal.4th at pp. 977-978.) "Whatever conclusions other reasonable minds might draw, on balance we find the decision tolerable given the court's broad latitude." (*Id*. at p. 981, fn. omitted.)

IV. DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

KING
J.